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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, German S. Lopez, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered on June 15, 1962.

Opinion of the Court Below.

The United States Court of Appeals for the First District, on June 15, 1962, without opinion, ordered, adjudged and decreed that "the judgment of the District Court, is affirmed."

Jurisdiction

The judgment of the Court below entered on June 15, 1962, is contained in the certified copy of Record of Proceedings in Court of Appeals below, filed with this petition. Jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon.*

II. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent which the agent surreptitiously obtained while in the office, and to admit the testimony of the agent of the conversation, where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

Constitutional Provisions, Statutes and Rules of Court Involved

1. *The Fourth Amendment provides* —

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. Rule 52(b) *Federal Rules of Criminal Procedure* reads:

> "*Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

3. Section 4231 of the Internal Revenue Code of 1954, 26 U.S.C. 4231, provides that:

> "There is hereby imposed:
>
> (6) Cabarets. — A tax equivalent to 10 percent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, "cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments; except that if the person receiving such payments is a concessionaire, the tax imposed under this paragraph shall be paid by such concessionaire and

collected from him by the proprietor of the roof garden cabaret, or other similar place. No tax shall be applicable under paragraph (1) or (2) on account of an amount paid with respect to which tax is imposed under this paragraph . . ."

Section 4232(b) of said Act provides:

"(b) Roof Garden, Cabaret or Other Similar Place. —The term "roof garden, cabaret, or other similar place," as used in this chapter, shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges, or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

Statement of Case

The petitioner, German S. Lopez, on October 24, 1961, had been conducting a restaurant and liquor business under a lease arrangement since March 1959 at Clauson's Inn, Falmouth, Massachusetts. (R. 102)[1].

The petitioner was indicted on four counts on bribery charges, in violation of Title 18, U.S.C. section 201.

Count 1 alleged that the defendant on October 21, 1961 bribed Roger S. Davis, a Revenue Agent in the United States Internal Revenue Service by giving him $420 with intent to induce said Davis to omit to do an act in violation of his lawful duty, to wit:

"to refrain from making an examination of the books and records relating to sales and receipts of the bar

[1] "R" refers to Record Appendix to Brief of Defendant-Appellant in Circuit Court below.

and lounge at Clauson's Inn, for the years 1959, 1960 and the first two quarters of the year 1961, from computing tax on said sales and receipts, and from reporting same to the Internal Revenue Service."

Counts 2, 3 and 4 charged that petitioner on October 24, 1962, did give as bribes to said Agent Davis respectively, in Count 2, $200.00, in Count 3 a promise of $200.00, in Count 4, a thing of value, to wit: an expense-paid weekend accomodation for said Roger S. Davis, his wife and family, at the Honeymoon Cottage, Clauson's Inn, North Falmouth, Massachusetts—with intent to influence him to aid in committing fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter. (R. 2-5).

The government's case at the trial with respect to the matter of cabaret tax attaching to the defendant's business operation proceeded on the basis that dancing or singing in connection with the orchestra or juke box playing in the bar and lounge area of Clauson's Inn would create a cabaret tax on sales in this area during such entertainment. (R. 9-12).

On January 31, 1962, the jury returned a verdict of Not Guilty on Count 1 and a verdict of Guilty on Counts 2, 3 and 4. (R. 1).

On February 6, 1962, the petitioner filed a Motion for Judgment for the defendant on Counts 2, 3 and 4 of the indictment, notwithstanding the jury's verdict. (R. 1).

The petitioner relies on Federal Rules of Criminal Procedure, Rule 52(b), on Questions I and II, supra, for right of review thereof.

At the trial, the Court admitted a wire recording of a

conversation of the petitioner with a government agent at the private office of the petitioner on October 24, 1961, and the testimony of the agent of the conversation, which were objected to as in violation of the Fourth Amendment. (R. 71-74). Later at the trial the petitioner raised the question of illegal entrapment at the time of argument, and the issue of entrapment was made a part of the Trial Court's charge. (R. 133, 134). It is submitted that if the evidence ought to have been excluded when presented, the defendant's rights thereto ought not to be precluded by the status later arising under the defense of illegal entrapment.

The following facts are uncontrovertible on the record.

1. Agent Davis testified that on August 31, 1961 he visited and observed the defendant's operation at Clauson's Inn, Falmouth, Massachusetts as a routine visit (R. 10, 33), twice the same day, and that prior thereto he had no knowledge of the operation. On the second visit, in the evening of the same day he testified he saw dancing in the lounge in connection with the entertainment, that he did not see the defendant and left the premises.[2] (R. 10)

2. Agent Davis testified that between August 31, 1961 and October 21, 1961 he did not have the defendant's business at Clauson's Inn under surveillance, and that during this time he did not visit the premises, and did not receive or make any report as to the defendant's business at the Inn; that he had no knowledge of what took place in the operation before October 21, 1961, excepting his alleged observance on the evening of August 31, 1961. He further testified that he came on his visit to the Inn on October 21,

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[2] In this connection, if there was dancing, there was no evidence that the defendant knew of it.

The defendant testified that on the evening of August 31, 1961 in the course of his work he was in and out of the bar and lounge at the Inn while Agent Davis was there. That he observed him there and saw no dancing in the area. That there was a sign displayed of "No Dancing" (which was introduced in evidence).

1961 alone, without prearrangement, as a routine visit to ascertain its activity with reference to cabaret tax liability (R. 32, 33).

3. The record is barren of any activity in the defendant's business operation at Clauson's Inn which would create a cabaret tax liability at any time prior to October 16, 1961.[3]

4. The testimony of Agent Davis was that at the meeting of the defendant with him on October 21, 1961, at Clauson's Inn, the defendant offered him a bribe to avoid the aggravation of an examination for cabaret tax liability for the period prior to the then tax quarter ending October 31, 1961, on the stated situation that the defendant had never filed a cabaret tax return applicable to the business. He further testified in this connection "that he (the defendant) didn't wish to be bothered filing any past tax returns for any past period going back to the time he was in business or started in business." (R. 14) Agent Davis evidence with respect to examination of the books of the

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[3] Agent Davis testified in cross-examination:

(The following question is read:

[56] "Q. What was the basis of your stating to Mr. Lopez on the night of October 21, 1961 that there would be a cabaret tax prior to October 17, 1961 in the figure that you now say you mentioned?

A. Sir, October 17th didn't enter into this."

"XQ. May I substitute the date of October 21, 1961 in the previous question? And would you give me an answer.

A. The figures discussed on October 21st related to a year, a year's figure.")

A. The basis of that, sir, was that I believe, the conversation that night, he stated that he had this Trio and a piano player for a period of time. Since this was October 21, I assumed it was for the period previous to October 21st. The basis of the calculation was that, the figure he gave me for $160,000 gross sales—the figure of $60,000 total sales for the bar and lounge, and his estimate of one-half of that, or $30,000 sales at night, and an estimate of tax would be $3,000." (R. 41)

He further testified in that connection "I did not tell him that he owed any money." (R. 43)

XQ. What right did you have to tell this man that he owed money for a year without an examination of books, and without

business, at this meeting, was that he would examine the same later when convenient. (R. 36-38)

His evidence was that he would return the following Tuesday in connection with the preparing of a 720 Form applicable to the quarter period ending October 31, 1961. (R. 47, 51) It was manifest at the meeting that the books did not carry cabaret tax data prior to October 16, 1961 and that the existence of cabaret tax liability related to the entertainment described which was collateral to the books. (R. 168). Davis testified that he was an accountant (R. 41).

5. Agent Davis testified that the events of the meeting on October 21, 1961 at the Inn, relating to the alleged bribe, took place in the defendant's office. That the defendant and Davis were alone at all times and there was no corroborating witness. (R. 33)

Davis testified that at this meeting $200. was placed on the desk in the office by the defendant and offered to

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any basis in fact that there was entertainment, including dancing, for the year 1961?

A. I did not tell him that he owed any money.

Agent Davis testified on cross-examination:

"Q. Is that your position now, that you did not tell him that night that you were just using figures at random, without having any purpose?

A. I did not tell him he owed any money to the government for the year 1961.

Q. Did you tell him he owed any money that night for the year 1960?

A. I told him—? No, sir.

Q. Did you tell him that night he owed any money for 1959?

A. No, sir.

Q. Was there a basis then for a cabaret tax prior to August 31, 1961?

A. I don't know, sir." (R. 43, 44)

There is in evidence Defendant's Exhibit B showing the ledger entry made on October 16, 1961, which reads. "Oct. 16, 1961 Change in policy of entertainment. From this date Liquor Sales subject to cabaret tax during entertainment hours. This tax is to be deducted from beverage sales which are subject to a rent charge." (R. 120)

Davis by the defendant with the request "to drop the case"; that this was repeated and that Davis refused each offer with the statement that he had a job to do, "to examine the books"; that later at the meeting the defendant "added some bills to it", which then made the amount $420., which was offered and refused. That the defendant got angry and insisted. Then, Davis stated, "I told him I asked him how much money was on the desk, and he said $420". About that time I picked the money up. It was about 10 o'clock. I put it in my pocket and left the office. (R. 15) [4]

Emanuel Shuster, Regional Director of the United States Internal Revenue Inspection Service, testified that the regulations of the Internal Revenue Service was that if a bribe was offered, or if there were facts indicating that a bribe might be offered the agent was to divert the subject, terminate the meeting and leave. (R. 101)

6. Agent Davis further testified on cross-examination as follows:

> "Q. I refer to the transcript, page 29, lines 21 to the end,
>
> > 'Q. Now coming back to the night of October 21, 1961 when you visited the premises there, in your conversation on the occasion did you agree on some basis with Mr. Lopez to fill out Form 720, the cabaret tax, in connection with Mr. Lopez' business at Clauson's Inn in Falmouth?
> >
> > A. I did not agree to fill out forms.
> >
> > The Court: The way you gave the answer, it would not appear on the record, because you gave

[4] The defendant's testimony was that he had given the agent $420 to do what was required on his own time, not the government's, for cabaret tax returns on the business (R. 111, 112).

it with an infonation. Will you please explain what you mean?

Q. Will you follow his Honor's suggestion?

The Court: Read the question and the answer please, Mr. Duffy.

(Question and answer were read.)

The Witness: Your Honor, I didn't agree to fill out the form. That is not my job. *What I agreed to was to return to the premises so that he could file a return, if due.* (Italics supplied).

Q. When you made that answer was the answer true?

A. Yes, sir.

Q. Is it true now?

A. Yes, sir." (R. 51)

7. The Revenue Inspection Service organized a plan to entrap the defendant by arranging for Davis to go to Clauson's Inn on October 24, 1961 and meet with the defendant at the defendant's private office. (R. 16, 17)

Richard A. Callahan of the said Service testified that on October 24, 1961 he placed a minifon recording on the person of Agent Davis, which was concealed, and also a Schmidt battery operated radio transmitter, with instructions to Agent Davis as to what he should do, when he went to Clauson's Inn in Falmouth (R. 66, 67) The evidence was that the Schmidt did not work. (R. 67)

Callahan testified:

"Q. State what those instructions were.

A. I instructed Agent Davis to try to steer the conversation back to the meeting of October 21 when he allegedly received $420, and I gave him certain instructions as to how to lead into that.

I told him that he should explain, go into a mathematical explanation as to what he thought was due tax-wise, and I also gave him technical instructions in that he should steer Mr. Lopez to a quiet place, possibly his office, not to rustle papers and to sit as close to Mr. Lopez as possible in the course of the conversation." (R. 67)

The witness Callahan described the Minifon recording device and as to how it was attached to the person of Agent Davis, and its operation. (R. 67)

Witness Callahan further testified."

"Q. As part of your instructions, did you say to him, 'Get the conversation back to the 21st. Get a general discussion as to what had occurred on the 21st.'

A. Yes, sir, I did.

Q. Did I understand you also to say, 'Give him some figures, tell him what you think is owed.'

A. Yes, sir. His opinion.

Q. His opinion?

A. Yes, sir.

Q. Now at that time did you have any facts, as far as you were concerned, as to whether anything was owed at all, any basis in fact whatsoever?

A. No, sir." (R. 94, 95)

8. Agent Davis testified that in concert with Agents from United States Revenue Inspection Service he came to Clauson's Inn on October 24, 1961, that one of the Agents entered the Inn, but not in his company, and other agents waited outside of the Inn. The agents who waited

outside had instruments to be operated so as to record sound communications from the Schmidt, if it worked.

Davis entered the private office of the defendant upon his request to the defendant pursuant to instructions.

The Minifon recording of what occurred in the office was introduced and played to the jury over the objection of the defendant, and marked as Government's Exhibit 6 (R. 75)

The defendant contends that the Minifon recording (Exhibit 6) establishes the following facts.

(1) Pursuant to plan Agent Davis by his request obtained entrance to the private office of the defendant on October 24, 1961.

(2) Agent Davis introduced "this 720 excise form we were talking about", and the defendant immediately exhibited his mind by a verbal act: "I—never did file cabaret tax. I never thought there was need of it." This exhibited the mind of an innocent man with respect to the subject of cabaret taxes of the business, and his relation to the occurrences of the meeting of October 21, 1961.

(3) Nevertheless the agent pursued the plan of entrapment. The following then occurred.

> "Davis: I had to do a little thinking about it. I want to give you a couple of figures now. I mean it took me a while." (R. 81)

A colloquy ensued on the subject of confidences between the defendant and Agent Davis, and the Agent pursued the matter of figures as follows:

> "Davis: O.K. I am going to put down some figures here. Your gross was about, gross sales about 160,000.
>
> Lopez: About 160,000.
>
> Davis: Now 40% of that is—

Lopez: I should say about 30, about 35, conservatively.

Davis: Well, we'll say about $50,000 is bar sales.

Lopez: Ya.

Davis: Now—maybe roughly half of that is at night.

Lopez: Well, I should say about half of that should be at night.

But I should say perhaps, you see, my dining room is a big seller and the bar, and my dining room sells and the the bar.

Davis: Ya, I understand that.

Lopez: This is the greatest. You see a very busy night at the bar, the bar itself may sell $150, $175, a good steady night in the lounge itself.

Davis: Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year." (R. 84)

The defendant contends that the statement of Agent Davis, "Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year" was completely false without any basis in fact.

The colloquy continues:

"Davis: No I'd say $20,000, conservatively 25 would be cabaret sales because—

Lopez: No.

Davis: Well, . . . the band and everything.

Lopez: *Most of the business . . . at night when people actually get up and dance I have not been allowed to stop it. Which would be Friday and Saturday nights. The other nights we don't have anything anyway. The other nights is a minor thing that I can always control, but Fridays and Saturday nights in*

the summer months, when I'm very very busy, I often neglect to get up there and do it." (Italics supplied)

At this point on the basis of the defendant's statement there was no intentionally allowable dancing and thus no cabaret tax, in the absence of special facts. This was clearly the mind of the defendant as expressed at the ouset of the meeting.

There then ensued the following with reference to the acts of Agent Davis indicating to the defendant that he was not using the quoted figures

"Davis: Well, I'm not . . .
Lopez: That's right.
Davis: I'm not using this." (R. 84, 85)

This statement of the Agent was an obvious fraud. The only time dancing occurred on the evidence was as stated by the defendant; and if that were excluded from consideration there would be no basis whatsoever to claim a tax. This fraud continues "You know just between you and I, I would say about $20,000 in taxable sales. You say your business isn't that much. Now, look, you went into business in 1959. In 1959 the tax was 20%." (R. 84)

The colloquy continues: (R. 84)

"Lopez: I only operated about six months under the 20%.
Davis: Well, that was 1959 and half of 1960.
Lopez: Ya.
Davis: Between 1959, out of the $20,000 could be maybe—
Lopez: Make it 5,000 . . .
Davis: Well, I'm trying to figure. You were open from March on. The big trade is in the summer.
Lopez: Ya.

Davis: Maybe 15,000. At 20% that would be $3,000.00 for 1959. In 1960, 5 months at 20%; the rest of this is 10%, do you remember that?

Lopez: Ya. . . .

Davis: Well, . . . about 20. And 8 of this was under the 20%; 8,000 and 12 was under the 10%. So, $8,000.00 at 20% would be 4,000. 12,000 at 10% would be 1,200. In 1961, well for half the year . . . 16,000; cabaret $3,000.00. No—

Lopez: You're very high Actually, I mean, you're very high.

Davis: Let's see what we have here anyway. (Counting) 2, 2, 4, 8, $11,200. Well, let's say . . . just for argument purposes — Between 9 and 10,000 dollars; that we know is — You havn't kept any records, you see. Now, I mean, I don't know what . . . exactly what your records show. How are your books? Do your books show any balance sheets?

Lopez: It shows just the

Davis: Well let's go back to the $10,000.00. The penalty for not filing any returns is 25%. $12,500 back taxes, conservatively, . . . plus 6% interest, which will go on to here will I'd say run over $13,000.00 *Now I don't want to get greedy or anything, but, well, what would you be gaining* . . . (R. 85) (Italics supplied)

Lopez: I have got a couple of hundred odd dollars for you right now. Listen—

Davis: Ya, but I mean, well—

Lopez: I have . . . money right now.

Davis: I know but—

Lopez: I'll tell you I'd like to pay as we go along and I'd like you to take me into your confidence. As we go along a couple of hundred every time you drop in. I'd like to keep it that way.

Davis: Well,

Lopez: Don't drop in too often.
Davis: How much is here?
Lopez: Two hundred, keep it." (R. 86)

The foregoing statements of Agent Davis were grotesquely fraudulent without any basis in fact. His statements became so reckless that he was stating, "So, 8,000 at 20% would be $4,000." and ended up with a mythical penalty.

The statement following the penalty, "now I don't want to get greedy or anything but, well, what would you be gaining"—is the request for the bribe.

The defendant contends that Agent Davis fabricated a false and fictitious claim in the mind of the defendant that a United States cabaret tax was due on his business, without any basis in fact and grossly inordinate with respect to the circumstances of the defendant, and that the Agent induced, provoked and in effect requested the defendant to bribe him to avoid the so-called claim; that the facts were further aggravated by the perilous position of the Agent Davis, who had received $420. from the defendant on October 21, 1961, allegedly as a bribe in connection with such a tax, in the situation where the Agent was alone with the defendant and without a corroborating witness and in any event in violation of regulations in his Department.

Reasons for Granting the Writ

1. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law and the petitioner was entitled to a verdict of acquittal thereon.*

Appellant contends that the uncontradicted facts in this case establish that he was entrapped as a matter of law and that he was entitled to a verdict of not guilty.

1. The much-cited case of *Sorrells* v. *United States*, 287 U.S. 435 is the foundation for the applicable law. Under this case entrapment is raised by the plea of not guilty.

The governing principles are stated in *Sorrells* at pages 441, 442:

> "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design * * *. A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

The Court went on to cite *Butts* v. *United States*, 8 Cir., 1921, 273 F. 35, 38, 18 A.L.R. 143, to the effect that it is unconscionable and contrary to public policy to punish a man for a crime he evidently would never have committed were he not inspired, incited, and persuaded by officials of the law. The Court decided that under such circumstances no crime was committed, for Congress could not have intended that an act within the literal meaning of a criminal statute would be a crime if incited by those whose purpose it is to prevent crime. Traps and decoys are sometimes permitted. "The predisposition and criminal designs of the defendant are relevant." 287 U.S. at page 451, 53 S.Ct. at page 216.

Sherman v. *United States*, 356 U.S. 369, held that the undisputed testimony established entrapment as a matter of law. On the record, a narcotics user under treatment for the addiction, as to whom there was no evidence that he was then in the trade was induced to make three sales of narcotics by a government agent. Except for a record of two convictions nine and five years previously, there was no evidence that petitioner himself was in the trade or that he showed a "ready complaisance" to the informer's request.

The court adhered to the majority opinion in *Sorrells* v. *United States*, *supra*, and declined to reassess the doctrine of entrapment according to the principles announced in the minority opinion which concurred in the result.

Sherman v. *United States*, *supra*, affirms, as did the *Sorrells* case, that entrapment occurs only when the criminal conduct "was the product of the creative activity of law-enforcement officials". It held further, "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent, and the trap for the unwary criminal."

The Court further said, "The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

2. The appeal to the Circuit Court below involved the defence of entrapment and presented to the Court the issue of whether the criminal intent proceeded from government agents or whether these agents simply afforded opportunities to one already disposed to the alleged criminality. *United States of America* v. *Klosterman*, 248 F.2d 191, 192, Third Circuit, 1957.

Klosterman decided that the test to be applied under the principles governing illegal entrapment is, was the defendant a man otherwise innocent who would not have committed the crime but for official solicitation, or *was he predisposed to pursue a criminal design which he had already conceived?* (Italics supplied.)

On the facts of that case, Deeney, an Internal Revenue Agent approached a fellow agent, King, with respect to a tax-payer's return then under investigation for an unusual time, with the statement that a friend of his who was an associate of the taxpayer, reported that the taxpayer would pay ten to twenty thousand dollars to settle the case. On the record, Deeney abandoned the original plan, and later was relentlessly pursued by the fellow agent under orders of their superiors to carry out the plan to bribe until the defendant yielded and agreed to arrange for a meeting of the other agent with taxpayer's associate. The Court applied the above-said test as to Deeney and held on the record, he was entrapped to commit bribery.

The Court stated: "The inordinate amount of persuasion of Deeney by King indicates two elements in this case. It clearly discloses that Deeney was sincere in his attempt to abandon his original plan. It shows also that the criminal design and intent for the commission of the actual bribery originated not with him but rather with the government agents who engineered the persuasion and solicitation."

In the instant case it is impossible logically to sustain on the evidence that the defendant on any basis whatsoever was pursuing a criminal design "which he had already conceived", with relation to the events of October 24, 1942 at the meeting of Agent Davis and the defendant at Clauson's Inn. The meeting was organized and carried out by the government agents to entrap the defendant. (Statement, Par. 7, spura) The genesis of the meet-

ing of October 24, 1961 and of the events that occurred at the meeting originated with the government agents after October 21, 1961.

On the record of this case at the trial there was no dispute that the defendant gave and agent Davis received four hundred twenty dollars on October 21, 1961. The issue was whether it was given and received as a bribe, and the jury decided that it was not a bribe under the charge.

The evidence introduced by the government as to the events occurring at the meeting of the defendant and the government agent Davis on October 21, 1961 was pertinent to establish a bribe on October 21, 1961. It necessarily related to a criminal disposition to commit bribery on October 21, 1961, if the evidence were true. It could not by its very nature sustain that he was disposed to pursue a criminal design to commit bribery on October 24, 1961 "which he had already conceived", since it is manifest that it was impossible for him to have had anything in his mind on an enterprise as to which he had no knowledge whatsoever before the event.

Further, the record is positive as to the agreement of agent Davis made on October 21, 1961 with the defendant, on the testimony of agent Davis, in response to the trial court's inquiry. "What I agreed to was to return to the premises so that he (the defendant) could file a return *if due*". (Emphasis supplied.) (Testimony of agent Davis, statement, supra, par. 6.)

At the meeting of October 24, 1961 (the facts of which are established on the minafon recording, (Statement supra, par. 8.) the criminal design as to the offenses charged in counts 2, 3 and 4 manifestly originated with the government agent Davis with the express purpose of inducing the defendant to commit the crime in order to prosecute him, and the government agent Davis induced,

provoked and solicited the defendant to commit the offenses.

This position is clearly shown on the recording. (See Statement supra, par. 8.)

(1) At the outset of the meeting of October 24, 1961, as shown on the recording, the defendant disclosed an innocent mind: "I—never did file cabaret tax. I never thought there was need of it". (Statement, supra, Par. 8. #2.) This verbal act frustrated immediately the avowed plan of the agents to relate the conversation back to the meeting of October 21, 1961. (Statement, supra, Par. 7.)

(2) Nevertheless agent Davis pursued the plan of entrapment by false statements of the existence of excise tax obligations which culminated in the agent's solicitation of the bribe: "Now I don't want to get greedy or anything, but, well, but what would you be gaining"—the request for the bribe. (Statement, supra, Par. 8.)

United States v. *Klosterman*, (Supra at pp 195-196), in its opinion with respect to the co-defendant Stafford, demonstrates the principles under the law of entrapment, whereunder the defendant here would be entitled as a matter of law to the status, on the record, of an innocent man at the outset of the meeting of October 24, 1961, and to the rule there stated "We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man".

4. *Accardi* v. *United States* held 257 F.2d 168 that

> "In rebutting the defense of entrapment, primary emphasis is on the defendant's predisposition to commit the crime, but a court must also carefully weigh the conduct of the government agents, which must not fall below reasonable standards of the proper use of government power in law enforcement."

At page 172, the Court said:

> ". . . The majority opinion in Sherman reaffirms the emphasis on the defendant's intention or readiness to commit the crime, as basic in rebutting entrapment; but the Court by no means downgrades the duty of scrutinizing closely the conduct of the government agents.[5]

Footnote 5. read in part:

> "In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the minority to the *conduct of the government agents.* There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods. 'The function of law enforcement is the prevention * * * not * * * the manufacturing of crime.'

It is submitted that when Agent Davis left Clauson's Inn on Saturday night, October 21, 1961 with $420 in his pocket which he received from the defendant, he was in a predicament. Obviously, he was in violation of regulations

of his Department in any event. He had been attached to the Internal Revenue Service for two years and was an accountant. A policeman investigating a matter as routine would consider it unthinkable, to take a bribe without a corroborating witness, and then attempt to explain it to a superior. On the facts in this case he testified that he first talked with a fellow agent after leaving the Inn on the night of October 21, 1961, and then later his group chief at the instance of the fellow agent talked with Agent Davis.

There was implicit in the concerted plan of the revenue inspection service agents for entrapping the defendant in his private office the relief of the perilous status of Agent Davis. The avowed plan according to the revenue inspection service agents was to relate back by statements, cabaret tax involvement and alleged bribery, relating to the meeting of October 21, 1961. This immediately failed on the statement of the defendant at the outset of the meeting of October 24, 1961 that he never filed a cabaret tax since he thought he never needed to. In this status the procedure adopted by Agent Davis in fabricating in the mind of the defendant, as if true, a false and fictitious claim of a government cabaret tax, with outrageously exorbitant figures, ending with a thrust for a bribe in the words "I don't want to be greedy" is highly reprehensible. There is inherent in it the aspect of gestapo or inquisition in attacking the human mind by lies and to involve the person attacked in crime. It is submitted that this cannot be countenanced, as a matter of law; certainly in conjunction with the other established facts.

11. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

It is submitted that this question presents a matter open to review under Federal Rules of Criminal Procedure 52(b) as plain error affecting substantial rights, viewed with respect to principles giving the right of review of a Judge's Charge undertaken without request, which manifestly misleads the jury by the instructions given on an essential issue, as decided in *Miller* v. *United States*, 120 Fed. 2nd, 968.

In the *Miller* case the Court stated the following:

> "In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not. *Kinard* v. *United States*, 68 App. DC 250, 96 Fed. 2nd. 522, 523; *Kreiner* v. *United States*, 2 Cir. 11 Fed. 2nd, 722, 731. Some courts have held that failure to instruct on the consideration to be accorded to character testimony in the absence of a request for such an instruction is not reversible error. *Kinard* v. *United States*, supra. It may be conceded that the court was not bound to instruct on character testimony in the absence of a request for such an instruction, but when it did proceed to instruct the jury thereon, it was required to give a correct instruction. It could not mislead the jury by an instruction which was erroneous. Misleading the jury in regard to the purpose for which they should consider character evi-

dence adversely affected the substantial rights of the defendants."

At the trial in the instant case the Court charged the jury on the question of entrapment as follows:

"Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.

Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account of dancing, if there were, Agent Davis obviously, in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.

Now the law with respect to entrapment is this: if a government agent by improper means or over-bearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means."

It is to be noted that there was no issue as to how an ordinary person would have reacted or done in the position of the defendant. The issue was whether the defendant was entrapped, not whether an ordinary person would have been.

United States v. *Landry*, 257 Fed. 2d 425.

Further the burden of proof must be allocated. The burden is upon the defendant to produce evidence that government agents induced him to commit the crime, and when evidence has been brought out by the defendant the government must prove beyond a reasonable doubt that inducement was not the cause or creator of the crime.

United States v. *Landry*, *supra*, at 428, 429.

Though the established facts on the record require a finding, as a matter of law, that illegal entrapment occurred, it is submitted that in any event the Court's charge was erroneous and misleading on the law of entrapment, and prejudicial to the Defendant.

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent with the petitioner, which the agent surreptitiously obtained while in the petitioner's office, and to admit the testimony of the agent of the conversation where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

After hearing, with evidence taken, of the Defendant's Motion and Petition to Suppress Evidence (R. 138, 138, 164, 165) the Court denied the Motion to Suppress the minafon recording, and the defendant's objection was renewed at the trial (R. 71 and 72) on the grounds that its admission and the admission of the testimony of Agent Davis of the recorded conversation was in violation of the Fourth Amendment. The grounds of the defendant's objection and the facts established relating thereto were as follows:

1. That the private office of the defendant at Clauson's Inn was a constitutionally protected area.
2. "That the government agent Davis on October 24, 1961 solicited and obtained permission to enter into the defendant's private office, where the de-

fendant conducted his business affairs in private ...." (Defendant's position, R. 137).

Agent Davis testified: That on October 24, 1961 he stated to the defendant that he desired to go with the defendant into his private office, and went there pursuant to said request (R. 140).

3. That Agent Davis "obtained this permission by misrepresentation of the status of his entry" (position of defendant R. 137), and "that on October 21, 1961—that the said agent had come to the said premises and had agreed with the defendant to return at a later date, namely, either Monday or Tuesday, which would be October 23 or October 24, 1961 on his own time to prepare 720 Forms for cabaret taxes actually due the government by the defendant—" (position of defendant R. 138). "That the acts and circumstances by which the agent gained entry into the private office on October 24, 1961 as it related to the arrangement agreed upon for his coming, were in effect a misrepresentation" (position of defendant R. 138).

These positions taken by the defendant were established as fact on the evidence.

(a) Agent Davis unequivocally stated in his testimony upon inquiry by the Court calling for precise statement: "What I agreed to was to return to the premises so that he (the defendant) could file a return, if due." (Statement supra #5, Record 51.)

(b) Reference is further made to the Statement, supra, #7 and #8, with record citations establishing that Agent Davis entered the Defendant's private office on October 24, 1961 pursuant to the planned operation of government agents for entrapment of the petitioner. It is submitted that the foregoing

acts and circumstances set out in the Statement established entry by the agent into the private office by misrepresentation.

At the conclusion of the hearing on the Motion to Suppress the Trial Court stated the issue and the basis of his denial of the Motion as follows:

"The Court: Well, it is perfectly clear that your theory is that the individul was admitted under a deceptive statement and, therefore, everything that was taken within the inner office was taken as a result of admission by deception.

Mr. Davis: That is right, sir.

The Court: So it applies to notes on a piece of paper as well as notations upon a wire recorder.

Mr. Davis: Well, if the paper—there might be a different state of facts on a piece of paper. If it was open and obvious that that was being done, that would be one thing, and I think probably distinguishable from an electronic device, which is secret.

The Court: Well, I understand the argument you make. It seems to me a distinction without a difference. The petition and motion are denied."

The Trial Court reiterated its position on this matter in its Charge to the Jury (R. 136).

It is submitted that the Court's statement that the obtaining of the minafon, Government Exhibit 6, was no different than if the agent took private notes after entrance into the private office (R. 136, 164, 165), is not sound. The minafon is no different than if another agent were in the office by stealth with the powers of a minafon.

However, the real ground of objection is that in light of the *Silverman* case, all evidence of the conversation of the

agent and the defendant of the meeting of October 24, 1961 in the private office, whether in the form of testimony of the agent or as recorded in the minafon, ought to be excluded as illegally obtained, in violation of the Fourth Amendment since the entrance to the office was gained by misrepresentation. Defendant's counsel in renewing his objection to the admission of this evidence at the trial stated this as his position. (R. 71)

That the minafon recording and the testimony of Agent Davis of what occurred at the meeting at Clauson's Inn on October 24, 1961 constituted the government's case on Counts 2, 3 and 4 cannot be disputed. If the said recorded conversation and the testimony thereof of Agent Davis were excluded, the government's case on Counts 2, 3, and 4 would fail for lack of proof.

Whether the securing and taking out the evidence from the private office of the Defendant should be accomplished by minafon on the person of Agent Davis, or transmission by Schmidt from his person, or by his personal faculties as such, each would be illegally obtained if entrance was gained by misrepresentation. In this respect a private office is on the same basis as a home. In effect it is a physical invasion of a constitutionally protected place as in *Silverman* v. *United States*, 365 U.S. 505, which distinguished and declined to reconsider the earlier cases of *Olmstead* v. *United States*, 277 U.S. 438, *Goldman* v. *United States*, 316 U.S. 129, *On Lee* v. *United States*, 343 U.S. 747.

In the *Silverman* case at the trial in the Federal District Court in which petitioners were convicted of gambling offenses under the District of Columbia Code, there was admitted in evidence over their objection testimony of police officers describing incriminating conversations engaged in by petitioners at their alleged gambling establishment, which the officers had overheard by means of an electronic listening device pushed through the party wall

of an adjoining house until it touched heating ducts in the house occupied by the petitioners. The Supreme Court held that such testimony should not have been admitted in evidence and the convictions must be set aside as in violation of the Fourth Amendment. It was held that on the record of the case, the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment. *Goldman* v. *United States*, 316 U.S. 129, and *On Lee* v. *United States*, 343 U.S. 747, distinguished.

In the *On Lee* case the agent, not an officer or employee of the United States Government, was a "stool pigeon" who used an electronic device at quarters in a Chinese laundry open to the public, to tap the conversation to a United States agent outside the premises.

In *Goldman* v. *United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L.Ed. 1322, it was held that the action of federal agents in placing a detectaphone on the outer wall of the defendant's hotel room and thereby overhearing conversations held within the room, did not violate the Fourth Amendment. There the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work the Court expressly reserved decision as to the effect on the search and seizure question of a trespass in that situation.

In the *Silverman* case the Court said as follows:

> "But in both Goldman and On Lee the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In Goldman there had in fact been a prior physical entry into the petitioner's office

for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U.S. at 134-135. And in *On Lee*, as the Court said, '. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 U.S. at 751-752.

The absence of a physical invasion of the petitioners' premises was also a vital factor in the Court's decision in *Olmstead* v. *United States*, 277 U.S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that '(t)he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '(t)he intervening wires are not part of (the defendant's) house or office any more than are the highways along which they are stretched.' 277 U.S., at 465. Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' *house or office*—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measur-

able in terms of ancient niceties of tort or real property law. See *Jones* v. *United States*, 362 U.S. 257, 266; *On Lee* v. *United States*, supra, at 752; *Hester* v. *United States*, 265 U.S. 57; *United States* v. *Jeffers*, 342 U.S. 48, 51; *McDonald* v. *United States*, 335 U.S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-630. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in Goldman and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was 'unwilling to believe that the respective rights are to be measured in fractions of inches'. But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635. We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch."

See strong concurring opinion by Mr. Justice Douglas in *Silverman* v. *United States, supra,* showing the basic philosophy and rationale underlying the decision. Also for this purpose see the strong dissenting opinion in the case of *On Lee* v. *United States supra.*

The Defendant argues that the premise in the above cases was physical penetration, and distinctions pertaining thereto.

But here there was physical invasion into the premises by misrepresentation. This would not differ from entrance by stealth without permission.

As an added reason for granting the Writ under Question III your petitioner replies to the brief of the Government filed in the Circuit Court below which calls upon the defendant to distinguish *Todisco* v. *United States*, 298 F.2d, 208, cert. den. 368 U.S. 984 and *United States* v. *Kabot*, 295 F.2d, 848, cert. den. 369 U.S. 803. (Government's brief, page 12, last paragraph.)

In the *Todisco* case a lawyer was indicted and found guilty of offering a bribe to settle a tax case of a client. There were a number of conversations taped and transmitted to recipients outside by a device on the government agent from the office of the defendant, all relating to conversations of a proposed bribe of $500.00. It was held not a violation of the defendant's rights under the Fourth Amendment.

It seems obvious that the agent in the instant case on the facts was in the office of the defendant by misrepresentation, as distinguished from the *Todisco* case embracing invited vists by the defendant in that case relevant to the object of the bribe. Manifestly in *Todisco* the evidence supported that the defendant was pursuing a criminal design which he had already conceived, whereas in the instant case this could not be found to be so.

The entrenching of a government agent in the office of the defendant, a constitutionally protected area, by misrepresentation and for the purpose of illegal entrapment seems clearly an invasion of privacy of the defendant under the Fourth Amendment. In the *Todisco* case there was no invasion of privacy whatsoever in legal contemplation.

The Court in *Todisco* refers to an article in a law review which assimilates a device such as a minifon with that of taking notes. As stated above, the learned Court in this case adopted such a view as expressed in his dealing with the Motion to Suppress and in his Charge to the Jury. It seems apparent that where the entrance is gained by misrepresentation into a private office, it is more the Trojan horse than a note-taking matter. It is submitted it goes to the very essence of the rights under the constitutionally protected area of the Fourth Amendment.

In *United States* v. *Kabot,* supra, an accountant was indicted and found guilty of offering and giving a bribe to a government agent to settle an income tax case of a taxpayer he was representing. The agent went to the office of the defendant with a minifon attached to his person to cover a situation indicating the offering of a bribe by the accountant, recorded a conversation concerning the subject matter, with explicit instructions not to lead the defendant on. Also a device was planted in the agent's hotel room to record and transmit to agents outside, the occurrences covering the same matter. This was clearly not the obtaining of entrance by the Agent into the office by misrepresentation, and there was absent any evidence as to illegal entrapment. Again, as in *Todisco,* this is distinguishable from the instant case.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

Appendix

United States Court of Appeals
For the First Circuit

No. 5981.

GERMAN S. LOPEZ,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Edward J. Davis for appellant.
William C. Madden, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *John J. Curtin, Jr.*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

June 15, 1962.

PER CURIAM. *Judgment will be entered affirming the judgment of the District Court.*